TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 552.

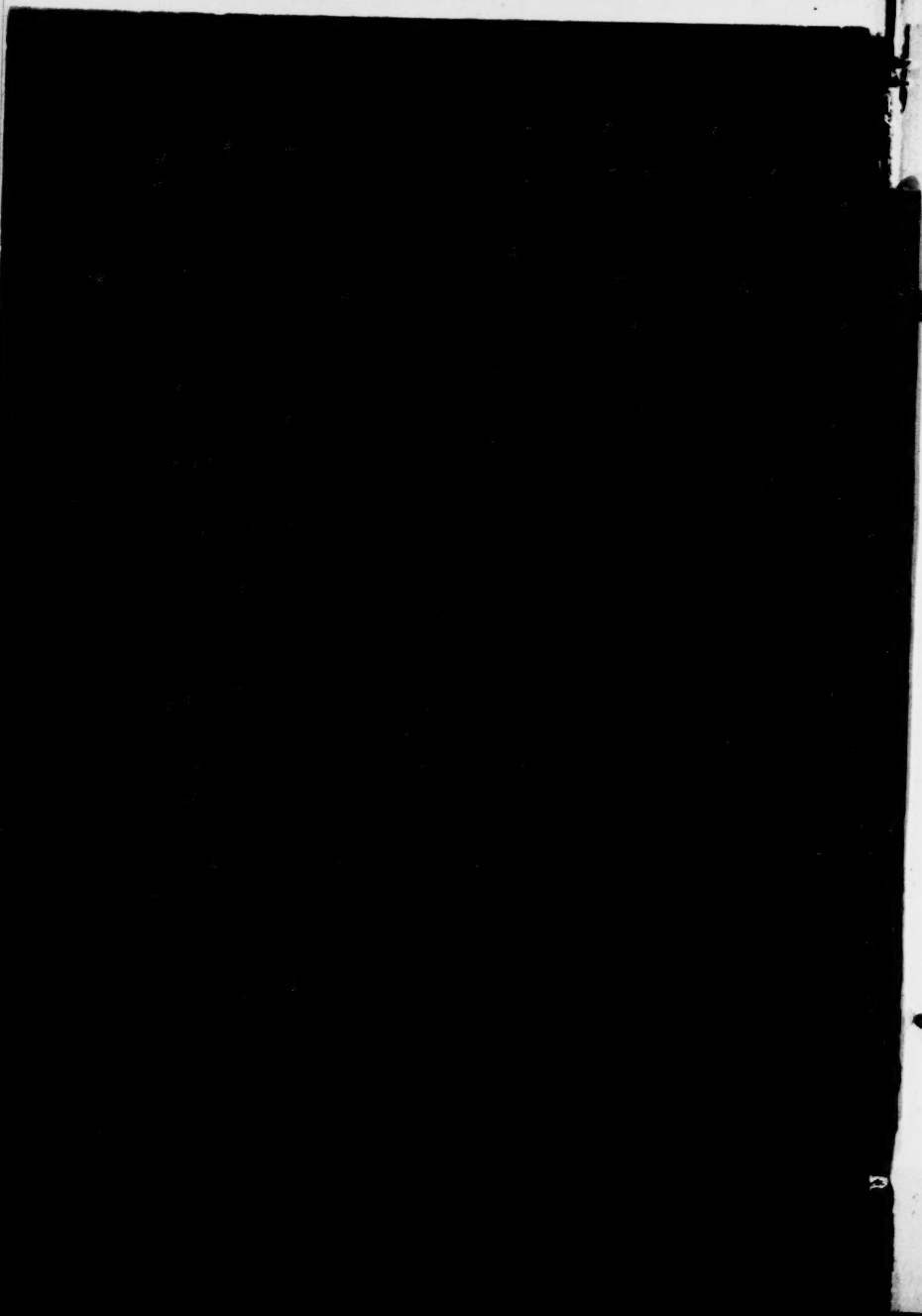
THE AMOSKEAG MANUFACTURING COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 18, 1871.



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1 *Petition.—Filed March* 15, 1870.

U. S. Court of Claims. December term, 1869.

AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } No. 6145.

To the Honorable Court of Claims:

The Amoskeag Manufacturing Company respectfully represents that it is a corporation created by and doing business under the laws of the State of New Hampshire.

That, in the month of April, A. D. 1863, by its duly authorized agent, Edward Lindner, it entered into a contract with James W. Ripley, Chief of the Ordnance Bureau, acting for and in behalf of the United States, for the manufacture of six thousand breech-loading carbines, which contract is evidenced by the following correspondence:

"WASHINGTON, D. C., *February* 25, 1863.

"GENERAL: During the month of October last, Senator Hale and myself had the honor of waiting upon you in regard to my breech-loading carbines; and in answer to the question, whether an order for ten thousand pieces could be granted to me, you had the goodness to state that it would be necessary to furnish first the five hundred carbines already contracted for with me. These five hundred pieces have been delivered to Major Hagner, at New York, a short time since, and every one of which was, after a severe and minute inspection and trial,
2 found, in every respect, to be perfect, by that officer of ordnance.

Under these circumstances, I beg the liberty to renew my application for an order of from five to ten thousand pieces, together with the necessary cartridges. Price of carbines, $20 a piece; price of cartridges, $22 per thousand. We are prepared—we, that is to say, the Amoskeag Company—to manufacture for delivery, one thousand pieces per month; and I beg to repeat a statement made in a former letter, that my carbines are superior to any so far introduced, a fact which has been officially acknowledged, and known at home and abroad.

"Awaiting your kind reply, general, to the foregoing, I have the honor to be, with kind regard,

"Your obedient servant,
(Signed) "EDWARD LINDNER,
"426 *Eleventh Street.*

"General RIPLEY,
"*Ordnance Department, &c.*"

"ORDNANCE OFFICE, WAR DEPARTMENT,
"*Washington, D. C., April* 13, 1863.

"SIR: Your letter of the 25th of February, 1863, applying for an order for an additional number of your carbines at twenty dollars each, and offering to furnish cartridges for the same at twenty-two dollars per M., was submitted to the War Department.

"By authority of that Department I now give you an order for all the carbines that you can make in six months from this date, not to exceed six thousand, to be of the same kind as the five hundred (500) carbines you delivered to Major Hagner, and to be inspected and approved by him. For each carbine, so delivered and accepted, you will be paid

twenty dollars ($20.) Two hundred cartridges will be required for each carbine received from you, to be paid for at twenty-two dollars ($22) per thousand.

"Please signify your acceptance or non-acceptance of this order.

"Respectfully, your obedient servant,

(Signed) "JAMES W. RIPLEY,

"*Brigadier General, Chief of Ordnance.*

"Mr. E. LINDNER,

"426 *Eleventh street, Washington, D. C.*"

WASHINGTON, *April* 17, 1863.

3 "GENERAL: I have the honor to acknowledge the receipt of your communication dated the 13th *interest*, tendering me an order for all the carbines (Lindner carbines) which I can make in six months from the date of your letter, not to exceed six thousand, and to be the same as the five hundred delivered to Major Hagner, &c. The Department further desires two hundred cartridges for each carbine, at twenty-two dollars per thousand. This order I have the honor to accept under the conditions above stated, and beg leave to express my thanks for the same.

"Trusting the Department will increase this order, I have the honor, general, to be, with high regard, your obedient servant,

(Signed) "EDWARD LINDNER,

"426 *Eleventh Street.*

"Brigadier General JAMES W. RIPLEY,

"*Chief of Ordnance.*"

"ORDNANCE OFFICE, WAR DEPARTMENT,

"*Washington April* 17, 1863.

"SIR: Mr. E. Lindner having accepted an offer from this Department to furnish Lindner carbines, a copy of the order is herewith inclosed for your information and guidance.

"Respectfully, your obedient servant,

"JAMES W. RIPLEY,

"*Brigadier General, Chief of Ordinance.*

"Major C. V. HAGNER,

"77 *East Fourteenth Street New York.*"

That, in pursuance of said contract, your petitioner proceeded at once to provide the necessary machinery, implements, and fixtures especially adapted for the purpose, and entered upon the manufacture of six thousand carbines to fill said contract, with the full knowledge of the officers of the Ordnance Bureau, representing the defendant in that behalf; and that your petitioner had ample facilities and a sufficient number of skilful employees to have manufactured six thousand of said carbines within six months, and would have completed that number within that time, but for the alterations which were requested and authorized by the defendant'; that, soon after the execution of said

4 agreement, the said General Ripley, representing the defendant' in that behalf, requested certain changes to be made in the construction of the said carbines, provided the same could be done without additional expense. The changes in the construction of the arms required by the Chief of Ordnance were made by the contractors, and these changes necessitated other changes to make the parts conform, and alterations in the machinery and new tools and fixtures to perform the work.

Your petitioner further shows, that the manufacture of said carbines was prosecuted by your petitioner under the oversight of Major Hagner, an officer of the Ordnance Bureau, who was detailed for the purpose, and who had knowledge all the time of the progress and prosecution of the work, and whose duty it was to inspect the arms when ready for that purpose; that, during the progress of the work and within the original term of six months, certain other changes were made in the construction of the arms for the purpose of increasing their efficiency and durability, which changes were made with the knowledge and approval of the defendant', and materially improved the arms; that, during the progress of the work and within the original term of six months, the petitioner was notified by the Ordnance Bureau of a rumor that the lot of five hundred (500) carbines previously furnished, had proved to be unsatisfactory in service, and the petitioner at once took steps to ascertain in what particulars, if any, said carbines had proved defective, in order to remedy the evil in those then in process of construction. The rumor proved unfounded, but the work was hindered and delayed thereby.

Your petitioner further shows that it had ample means and facilities for the manufacture of said 6,000 arms during the said term of six months, and would have completed that number within that time but for the delays and hindrances caused by the defendant'.

5 Your petitioner further shows that the said carbines were not completed within six months from the date of the said order, but that the work continued to progress after the expiration of that time with the knowledge of the principal officers of the Ordnance Bureau, and that no notice or intimation was given to the petitioner not to proceed, or of any objection to be made to receiving said carbines on account of the expiration of the said term; that the said contractors proceeded, from the inception of the said contract, to fulfill the same in good faith, and without unnecessary delay, and within a reasonable time, to wit, on the 5th day of April, 1864, had the whole number of six thousand ready, and offered them for inspection, according to the terms of their contract; but the defendant' refused to cause said arms or any part thereof to be inspected, or to receive or pay for the same.

Your petitioner further shows that, for arms of this description, there is not any demand in the market as an article of merchandize; that they were made for the exclusive use of the United States, and could not be sold to other purchasers for any price approximating to the cost of manufacture; that, for these reasons the value of the said arms for general sale at the time they were so completed and offered to the defendant' did not exceed three (3) dollars per arm; that your petitioner, by the refusal of the defendant' to receive said arms, has sustained damage to the amount of $102,000.00.

And petitioner further shows that it has presented said claim to the War Department, and the Honorable Secretary of War has transmitted to this court all the papers in the cause, together with an admitted statement of facts, and asking in pursuance of the act of Congress, approved June 25, 1868, the decision of this court, whether upon the facts presented, the United States not having accepted or paid for said arms, is legally bound to answer to the petitioner. And petitioner admits the truth and correctness of the said statement of facts so transmitted by the Honorable Secretary of War.

6 Petitioner further shows that, according to the custom and usage of the trade, it made the necessary cases for the said six

thousand arms, which cases cost the sum of twelve hundred dollars, and which the Government was bound by such usage to pay for; that the defendant' has refused to receive or pay for the same, and that their value does not exceed two hundred dollars, whereby your petitioner has sustained further damages to the sum of one thousand dollars.

Your petitioner further shows that it has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and prays the judgment of this honorable court for the said sum of one hundred and three thousand dollars, ($103,000.00,) and for such other and further relief as the nature of the case may show it is entitled to.

CHA'S F. PECK,
Solicitor for Claimant.

DISTRICT OF COLUMBIA,
County of Washington, ss :

Arthur M. Eastman, being duly sworn, deposeth that he is the attorney-in-fact of the company named in the foregoing petition; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, that claimant is justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts as stated in said petition are true.

ARTHUR M. EASTMAN.

On this 14th day of March, A. D. 1870, Arthur M. Eastman, personally appeared before me, a notary public within and for the county of Washington, in the District of Columbia, and made affidavit that the within statement signed by him *to be* the truth to the best of his knowledge and belief.

[SEAL.] FRED'K KOONES,
Notary Public.

7 Claimant's address—*Manchester, N. H.*
Claimant's solicitor.—C. F. PECK,
1115 *Penn. Ave., Washington,*
District of Columbia.

S. M. JOHNSON, *of Counsel.*

8 In the United States Court of Claims. December term, A. D. 1869.

AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } No. 6145. Filed May 17, 1870.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of one hundred and three thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government

of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney General.

9 U. S. Court of Claims. Dec. term, 1870.

AMOSKEAG M'F'G CO.
vs.
THE UNITED STATES. } 6145.

Now comes the said claimant, & by leave of court first obtained amends its petition as follows:

"Petitioner further shows that it has always borne true allegiance to the United States."

C. F. PECK,
Att'y for Claimant.

Arthur M. Eastman, being duly sworn, deposeth and saith that he is the agent of the claimant, and that he believes the facts as stated in the above amendment are true.

ARTHUR M. EASTMAN.

Subscribed and sworn to before me this 7th day of March, 1871.
[SEAL.] JOHN RANDOLPH,
Ass't Clk C't of Claims.

10 In the Court of Claims.

AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } No. 6145.

At a Court of Claims held at the capitol, in the city of Washington, twenty-seventh of March, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant take nothing by its petition, and that the same be dismissed.

By the court.

A true copy of record.

11 United States Court of Claims. Dec. term, 1870.

THE AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } No. 6145.

Now comes the said claimant and prays that an appeal be allowed it from the judgment of the court in this cause to the Supreme Court of the United States.

C. F. PECK,
Solicitor for Claimant.

Filed in the clerk's office April 10, 1871.

THE AMOSKEAG M'F'G CO. }
vs. } 6145.
THE UNITED STATES. }

Ordered, that the appeal as prayed for be allowed.
By the court.
APRIL 10, 1871.

12 Court of Claims.

AMOSKEAG MANUFACTURING COMPANY }
vs. }
THE UNITED STATES. }

Findings of fact and conclusions of law.

This case having been heard before the chief justice and judges of the Court of Claims, at the city of Washington, on the 7th & 8th days of March, 1871, the court, after due deliberation upon the proofs and evidence given at the trial, does hereby, at the time of rendering judgment, find the following facts:

I. The claim on which this action is brought being before the Secretary of War, and no disputed facts existing, but there being a controverted question of law, an agreed statement of facts was made,
13 and the Secretary thereupon, on the 31st of January, 1870, transmitted the claim, with the agreed statement of facts, to the Court of Claims, which submission and statement are in the words following:

"WAR DEPARTMENT,
"*Washington City, January 31st*, 1870.

"To the honorable judges of the Court of Claims of the United States:

"The undersigned, Secretary for the Department of War, hereby represents that a claim against his Department has been preferred in behalf of the Amoskeag Arms Company, which claim he desires to refer for decision to your honorable court. The said claim, although involving, as now presented, no disputed facts, does yet involve a controverted question of law, and is for a larger amount than three thousand dollars, and is therefore subject to be so referred under the seventh section of the act of June 25, 1868, in reference to the jurisdiction of the Court of Claims."

14 The facts in the case which have been the subject of agrreement are as follows:

"1. On the 26th of February, 1863, Edward Lindner, patentee of the Lindner carbine, made a written application to General Ripley, then Chief of Ordnance in the War Department, for an order to furnish a quantity of his carbines, as shown per his letter appended hereto, marked A.

"2. On the 13th of April following General Ripley, by authority of the War Department, gave said Lindner an order for all the carbines he could make in six months, not exceeding six thousand, as per letter dated April 13, 1863, appended hereto, marked B.

"3. On the 17th of the same month said Lindner addressed a letter to General Ripley, accepting said order, as per his letter dated April 17, 1863, marked C.

"These papers, A, B, and C, constitute the original grounds
15 upon which this claim is founded.

"It was understood that the Amoskeag Company were to fabricate the arms at their works, at Manchester, New Hampshire, said company having made the five hundred carbines previously furnished, to which reference is made in the above-named papers, marked A and B.

"4. Major Hagner, an officer of the Ordnance Department, whose special duty it was to oversee the manufacture of contract arms, and to inspect them, was immediately informed by General Ripley of the order to Mr. Lindner, as per letter hereto appended, marked D.

"On the receipt of the foregoing order the Amoskeag Company commenced preparations to fabricate the arms and purchase certain tools and fixtures especially adapted to the fabrication of the carbines, as ordered, with the changes immediately hereafter referred to,
16 the company having on hand a portion of the machinery for their fabrication.

"5. On the 23rd of April, 1863, General Ripley, Chief of Ordnance, addressed a letter to Mr. Lindner requesting certain changes to be made in the construction of said carbines, as per letter hereto appended, marked E.

"6. When about the six months limited in the order for the completion of the contract expired, (viz, in November, 1863,) the carbines were not finished and ready for inspection, but parts were in progress, and some of them were approaching completion.

"No notice was then or ever given to the contractors not to proceed with the work, or that objection would be made that the arms were not furnished in the six months limited in the order. Major Hagner, inspector of contract arms, was occasionally at the company's works, and knew of the progress of the work.

17 "7. On or about the 5th of April, 1864, Hon. E A. Straw, agent of said Amoskeag Company, called on the Chief of Ordnance, at the War Department, and exhibited a finished carbine as a specimen of the six thousand carbines the Amoskeag Company had in progress of fabrication under the aforesaid order, and represented that all the six thousand carbines were then so far advanced as to be ready for delivery to the inspectors as fast as they could receive and inspect them, and asked that they be then inspected and received by the Department, which was not then, and has not since, been done.

"8. Inspection of contract arms is always at the place of manufacture, and is made of the parts of arms before they are assembled, and again of the complete arm after the parts are put together.

"9. Arms are said to be ready for inspection, and it is the
18 common practice for contractors to call for inspectors and for the Department to furnish them, when the parts of the arms are so far advanced that they can be finished and furnished to the inspectors as fast as they can receive and inspect them, in the ordinary course of inspection. Such is the usual course of proceeding in cases of contract arms.

"10. The changes in the construction of the arms required by the Chief of Ordnance, were made by the contractors, and these changes necessitated other changes to make the parts conform, and alterations in the machine, and new tools and fixtures to perform the work.

"Other changes were made in the construction of the arm by the contractors, on their own motion, which were important and judicious, and materially improved the arm.

19 "Precisely how much time these changes required is not

agreed, but it is admitted by the Department that they necessarily required at least two or three months, a part of which resulted from the action of the Department, and that the contractors proceeded in good faith, and without unnecessary delay.

"11. Before the expiration of six months from the date of the order to Lindner, it was reported to the contractors, from the Ordnance Bureau, that it was rumored that the five hundred carbines previously furnished, had proved unsatisfactory in service, and the contractors made what effort they could to ascertain in what particulars, if any, said carbines were defective, in order to remedy the evil in those then in process of construction. The rumor proved unfounded, but the work was hindered and delayed thereby.

20 "12. From July, 1863, to April, 1865, the Government constantly had inspectors at the company's works, at Manchester, under the direction of Major Hagner, inspecting muskets made by said company for the Government. The precise time when said six thousand carbines were finished and assembled, is not agreed; but it is admitted and agreed that said carbines were so finished in May, 1865, and that said Amoskeag Company then had said carbines at the place of their manufacture, in Manchester, New Hampshire.

"13. In many cases of contract arms, there have been renewals and extensions of time.

"Reports embracing facts of this case, then and now claimed, and admitted by the Ordnance Bureau, as per papers hereto appended, marked F., G., H., I., K., have been made to the War Department."

21 Paper marked A, is as follows:

"WASHINGTON, D. C.,
February 25th, '63.

"GENERAL: During the month of October last, Senator Hale and myself had the honor of waiting upon you in regard to my breech-loading carbines, and in answer to the question whether an order for ten thousand pieces could be granted to me, you had the goodness to state that it would be necessary to furnish, first, the five hundred carbines already contracted for with me. These five hundred pieces have been delivered to Major Hagner, at New York, a short time since, and every one of which was, after a severe and minute inspection and trial, found, in every respect, to be perfect, by that officer of ordnance. Under these circumstances I beg the liberty to renew my application for an order of from five to ten thousand pieces, together with the

22 necessary cartridges. Price of carbines, $20 apiece; price of cartridges, $22 per thousand. We are prepared—we, that is to say, the Amoskeag Company—to manufacture, for delivery, one thousand pieces per month, and I beg to repeat a statement made in a former letter, that my carbines are superior to any so far introduced, a fact which has been officially acknowledged, and known at home and abroad.

"Awaiting your kind reply, general, to the foregoing, I have the honor to be, with high regard,

"Your obedient servant,
(Signed) "EDWARD LINDNER,
"426 *Eleventh Street.*

"GENERAL RIPLEY,
"*Ordnance Department, &c.*"

Paper B is as follows:

"ORDNANCE OFFICE, WAR DEPARTMENT,
"*Washington, D. C., April 13th*, 1863.

23 "SIR: Your letter of the 25th of February, 1863, applying for an order for an additional number of your carbines at twenty dollars each, and offering to furnish cartridges for the same at twenty-two dollars per M., was submitted to the War Department.

"By authority of that Department, I now give you an order for all the carbines that you can make in six months from this date, not to exceed six thousand, to be of the same kind as the five hundred (500) carbines you delivered to Major Hagner, and to be accepted and approved by him. For each carbine so delivered and inspected, you will be paid twenty dollars, ($20.) Two hundred cartridges will be required for each carbine received from you, to be paid for at twenty-two dollars ($22) per thousand.

"Please signify your acceptance or non-acceptance of this order.

"Respectfully, your obedient servant,
(Signed) "JAMES W. RIPLEY,

24 "*Brigadier General, Chief of Ordnance.*

"Mr. E. LINDNER,
"426 *Eleventh Street, Washington, D. C.*"

Paper C is as follows:

"WASHINGTON, *April* 17, 1863.

"GENERAL: I have the honor to acknowledge the receipt of your communication dated the 13th instant, tendering me an order for all the carbines (Lindner carbine) which I can make in six months from the date of your letter, not to exceed six thousand, and to be the same as the five hundred delivered to Major Hagner, &c. The Department further desires two hundred cartridges for each carbine, at twenty-two dollars per thousand. This order I have the honor to accept, under the conditions above stated, and beg leave to express my thanks for the same.

"Trusting the Department will increase this order, I have the honor, general, to be, with high regard, your obedient servant.

25 (Signed) "EDWARD LINDNER,
"426 *Eleventh Street.*

"Brigadier General JAMES E. RIPLEY,
"*Chief of Ordnance.*"

Paper D is as follows:

"ORDNANCE OFFICE, WAR DEPARTMEMT,
Washington, April 17, 1863.

"SIR: Mr. E. Lindner, having accepted an offer from this Department to furnish Lindner carbines, a copy of the order is herewith inclosed for your information and guidance.

"Respectfully, your obedient servant,
(Signed) "JAMES W. RIPLEY,
"*Brigadier General, Chief of Ordnance.*"

"Major P. V. HAGNER,
"77 *East Fourteenth Street, New York.*"

Paper E is as follows:

"ORDNANCE OFFICE, WAR DEPARTMENT,
"*Washington, April* 23, 1863.

"SIR: The following extract is taken from a letter of Major Hagner, the inspector of contract arms, viz:

"'I think Lindner's carbines, under the new order, should have the hind sight made for three elevations, and be placed in front
26 of the receiver; it is now too close to the eye. The lock-plate should be slightly changed in front of the cone-seat, so as to have the metal protect the wood; it is liable to be easily split at present.'

"Please report whether these changes can be made without additional cost to the arm. If so, let the change be made at once.

"Respectfully, your obedient servant,
(Signed) "JAMES W. RIPLEY,
"*Brigadier General, Chief of Ordnance.*

"MR. E. LINDNER,
"*Care of Amoskeag Company, Manchester, N. H.*")

"These papers, A, B, C, D, and E, are made part of the agreed statement of facts.

"The papers marked F, G, H, I, & K, it is agreed, as I understand, were written and signed by the persons by whom they purport to be written and signed, and sent to the persons to whom they purport to be addressed, at their respective dates, and were received by the per-
27 sons to whom they were addressed; but it is not agreed that the facts stated in them are true. These papers are, F, a report from General Dyer, Chief of Ordnance, to the Secretary of War, dated January 24, 1867; H, a report from General Dyer, Chief of Ordnance, dated May 30, 1867, not expressly addressed to any person, but supposed to have been made to the Secretary of War; I, an opinion of Judge Advocate General Holt to the Secretary of War ad interim, dated September 12, 1867; K, a letter from Brevet-Colonel Crispin, major of ordnance, to General Dyer, Chief of Ordnance, dated May 23, 1867. These papers, F, G, H, I, and K, seem to me immaterial, and they are not set out. Lindner, it seems, acted in behalf of the company, and his letters and acts are regarded as the letters and acts of the company.

"The controverted question of law is understood to be whether
28 the United States, not having accepted or paid for said arms, is bound legally to answer, and if so to what extent, for its refusal to do so.

"This question, upon the facts above presented, is submitted for the judgment of your honorable court, and with it are submitted, also, all the papers bearing on the case which have been filed in this Department, for particular mention of which reference is made to the list hereto appended.

"W'M W. BELKNAP,
"*Secretary of War.*"

II. Upon the trial of the case the claimant, beside the foregoing agreed facts, put in evidence certain testimony establishing the following ultimate facts:

1. The Amoskeag Manufacturing Company is a corporation duly established by law, and having its place of business at Manchester, New Hampshire.

In 1862, the company manufactured 500 Lindner carbines for
29 the defendants and delivered the same. Subsequently, and on

the 13th April, 1863, another contract was entered into, embraced in the correspondence and order set forth in the petition. Upon the receipt of the order of the Ordnance Department, and immediately after the 13th April, 1863, the company prepared to make the 6,000 carbines named in the contract. After they had been put in process of manufacture, the Ordnance Department, on the 23d April, 1863, requested and directed, by written communication, changes and alterations to be made in the arms, if it could be done without additional cost. The company undertook to make the changes and alterations desired, when it was found that other alterations were necessary to conform to those requested, and still others were necessary to perfect the arm, including that of interchangeableness of parts. As soon as possible a new model
30 was made combining all the changes, alterations, and improvements, and that model was approved by Major Hagner, then superintendent for the Government of contract arms, who was often at said company's works. (A model has to be made by hand and is a slow work, as each piece has to be filed and fitted separately, and afterwards becomes the pattern by which steel dies and *gauges*, cutting, milling, and other tools are to be made, so as to make all the different parts similar and interchangeable.) The company made all of these alterations, which materially added to the value of the arms without additional charge, in good faith, diligently, and without any delay other than that caused by the action of the Government. The time consumed by the company in filling the contract beyond the time fixed and limited
31 by the terms of the contract, to wit, six months, up to the time the six thousand carbines were ready in their several parts, and were offered to the War Department for inspection, was rendered necessary and indispensable by the changes, alterations, and delays caused solely by and for the interest of the Government. They were so offered April 5th, 1864. As the Government neglected to inspect the parts, they were kept for several months waiting for that purpose. They were finally inspected by a competent person provided by the company, were assembled or put together, and packed in cases of Government pattern complete. The company had means and facilities, and could have delivered the six thousand carbines of the kind contracted for, within the six months limited in conformity with the contract as first made, had not the changes and alterations been desired and re-
32 quested. The company was manufacturing other arms for the Government at the time of this contract, and continued to do so until the war closed. In all other work on guns made the Government kept a corps of inspectors, inspecting the work as fast as it progressed, but in this case they neglected to do so. They had inspectors at Manchester at the precise time these carbines were ready for inspection, but they did not inspect them.

2. Since the carbines were completed and packed in their cases, Col. Crispin, an officer from the Ordnance Office, called at the works of said company in Manchester, by the order of Gen'l Dyer, Chief of Ordnance, to examine these carbines. He counted the cases, and several were opened for his examination, and at his request a case selected by him was sent to New York for his more particular and critical exam-
33 ination. The case of arms has never been returned to said company.

3. The gun-cases described in the petition were extra, and were always paid for by the Government. These cases cost from three dollars to three dollars and-a-half each, and were of the value of $1,200. They

were used for packing the carbines after the Government had neglected to inspect and receive them.

4. The six thousand carbines are now in the possession of the company and of the value of $3 each.

5. The contract required two hundred cartridges with each carbine, called Lindner's patent cartridge, but the carbines could have been used with the ordinary Government cartridge, and were so designed that they might be so used. The company did not in fact manufacture nor tender to the defendants such cartridges, but the same were man-
34 ufactured and sold in the market, and the company was ready and willing to procure and deliver them if the defendants had accepted the carbines.

And the judges of the Court of Claims being equally divided as to the admissibility and legal effect of the agreed facts; and being also equally divided as to the admissibility and effect of the testimony, other than the agreed facts in an action so transferred by the head of an Executive Department under the act 25th June, 1868, (15 Stat. L, p. 75, § 7,) and certified by him to involve only a controverted question of law, the court for the purposes of an appeal decides as a conclusion of law:

That upon the facts found, judgment should be for the defendants, and the petition should be dismissed.

By the court.

35 In the United States Court of Claims. December term, 1870.

AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } 6145.

Now upon the trial of this cause, the claimant requests the court to find specifically as to the following facts:

1 to 14, refused except as incorporated in the findings of the court.—C. C. N.

(The proposed findings of facts by the claimant from 1 to 14 inclusive are in the identical language of the first finding of the court from 1 to 13, inclusive.

JNO. RANDOLPH,
As't Clk C't. of Claims.)

15. Allowed.—C. C. N.

36 15. That the claimant had the facilities to make, and could have manufactured, six thousand carbines of the pattern originally ordered within six months from the date of the order.

16. Allowed as incorporated in the findings of the court.—C. C. N.

16. That as a result of the changes ordered by the Government and the changes necessarily consequent therefrom, it became necessary to make a new model gun to work by.

17. Refused as not being an ultimate fact.—C. C. N.

17. That a model of this kind must be made by hand, and is a very slow job.

18. Refused as not being an ultimate fact.—C. C. N.

18. That the new tools required for the work as changed must be made after the model.

19. Refused as irrelevant.—C. C. N.

19. That in making the new model gun, in this case, the claimant introduced some additional changes which were judicious & materially improved the arm.

20. Allowed as modified in the findings of the court.—C. C. N.

20. That this model gun when prepared was submitted to Col. Hagner, and approved by him.

21. That the claimant proceeded to prepare for the change in the plan, and executed the contract as changed, with reasonable diligence. 21. Allowed as incorporated in the findings of the court.—C. C. N.

37 22. That, about the first of April, 1864, the whole number of 6,000 carbines were so far advanced as to be ready for delivery, as fast as they could be inspected. 22. Allowed as modified in findings of the court.—C. C. N.

23. That, as the Gov't did not furnish an inspector, the claimant did not assemble the parts, and put the guns together for several months. 23. Allowed as modified in the findings of the court.—C. C. N.

24. Some time prior to May, 1865, the guns were so completed. 24 & 25. Allowed as modified in the findings of the court.—C. C. N.

25. And an inspector from the Ordnance Bureau called at the company's work, inspected the guns, and took away one case which have never been returned.

26. That the claimant never gave aid or comfort to the rebellion, or to persons engaged therein, and always bore true allegiance to the United States. Allowed.—C. C. N.

C. F. PECK,
Sol'r for Claimants.
N. P. CHIPMAN,
Of Counsel.

The marginal endorsements upon the foregoing proposed findings for claimant are by the court.

JOHN RANDOLPH,
Ass't Clk C't of Claims.

(Indorsed:) 6145. Amoskeag Man'f Co. vs. The United States. Finding of facts asked for by claimant.

38 In the Court of Claims of the United States. Dec. term, 1870.

THE AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } 6145.

And now on this seventh day of March, 1871, come the defendants, by their Attorney General, and respectfully request the court to find that the following are the facts, in the above-mentioned cause.

1 to 13 refused as included in the findings of the court.—C. C. N. (The proposed findings of facts by the defendants, from 1 to 13, inclusive, are in the identical language of the first finding of the court, from 1 to 13, inclusive.

JOHN RANDOLPH,
Ass't Clk Ct of Claims.)

39 14. It further appears that the Linder carbine inspected in December, 1862, was made up from old stock modified by applying Lindner's breech attachment; the gun was not specially made for that attachment. 14. Refused as irrelevant and as being evidence.—C. C. N.

With the facilities it possessed in the spring of 1863, the claimant was unable to complete and deliver, under the original contract, one thousand carbines per month from the date of that contract. Its maximum delivery would not have exceeded four thousand during the six months ending

October, 1863, or six thousand during the whole year 1863.

15. Allowed.—C. C. N. 15. The changes suggested by the defendants on April 23, 1863, constituted the only alterations made at their request.

16. Refused as against the weight of evidence.—C. C. N. 16. These changes were slight, and did not necessitate any delay in the claimant's manufacture of the carbines. Nor was such delay thought necessary at the time.

17. Refused as irrelevant.—C. C. N. 17. Major Hagner, the Government inspector, frequently officially visited the claimant's works during the six months from April to October, inclusive. There he observed no progress in the manufacture of the carbines, nor was he informed by the claimant, through his agents, that the weapons were in process of manufacture. Nor was he ever called to inspect any of said carbines. On the other hand, he urged promptitude on the claimant in the performance of the contract, and suggested the necessity of applying to the Chief of Ordnance if the claimant desired any extension of time.

No such application was ever made.

18. Refused as irrelevant.—C. C. N. 18. During these six months the claimant's works were employed on rifled muskets in fulfillment of a Government contract for such arms.

19. Refused as irrelevant.—C. C. N. 19. The specimen carbine exhibited to the War Department by claimant's agent, on April 5, 1864, was of the same kind of work furnished by claimant for its musket and was evidently made by musket machinery employed in the fulfillment of musket contracts performed during 1863, and of the spare parts of musket-work which had accumulated during 1863.

(See record, p. 28, clause 7.)

THOMAS H. TALBOT,
Ass't Att'y Gen'l.

The marginal endorsements upon the foregoing proposed findings by the defendants, are by the court.

JOHN RANDOLPH,
Ass't Cl'k Ct. of Claims.

(Indorsed:) No. 6145. Defendant's request for findings of facts.

In the Court of Claims.

AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES. } No. 6145.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitors for the claimant for the allowance of an appeal, as filed in the clerk's office, April 10, A. D. 1871, and of the order of the court, allowing the same; of the findings of facts and conclusions of law thereon, on which the court founded its judgment; also the proposed finding of the claimant and defendants, respectively.

In testimony whereof I have hereunto set my hand and affixed the

seal of said court at Washington, this ninth day of December, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 552. The Amoskeag Manufacturing Company, appellant, vs. The United States. Court of Claims. Filed 18th December, 1871.

O

Supreme Court of the United States.

OCTOBER TERM, 1873.

THE AMOSKEAG MANUFACTURING COMPANY, Appellant,

vs.

THE UNITED STATES, Appellee.

No. 95.

ARGUMENT FOR APPELLANT.

C. F. PECK,
Attorney for Appellant.

W. W. MacFARLAND,
Of Counsel.

McGILL & WITHEROW, Printers, 1107 E street, Washington, D. C.

Supreme Court of the United States.

THE AMOSKEAG MANUFACTURING COMPANY, Appellant,

vs.

THE UNITED STATES, Appellee.

No. 95.

APPEAL FROM THE COURT OF CLAIMS.

ARGUMENT FOR THE APPELLANT.

STATEMENT OF THE CASE AND OF THE QUESTIONS RAISED.

This was an action brought by the appellant in the Court of Claims, to recover damages arising from the refusal of the officers of the War Department to receive a lot of six thousand patent Lindner carbines, which had been manufactured expressly for its use under a written contract with the Chief of the Ordnance Bureau. The contract is found in the following correspondence:

"WASHINGTON, D. C., *February* 25, 1863.

"GENERAL: During the month of October last Senator Hale and myself had the honor of waiting upon you in regard to my breech-loading carbines; and in answer to the question, whether an order for ten thousand pieces could be granted to me, you had the goodness to state that it would be necessary to furnish first the five hundred carbines already contracted for with me. These five hundred pieces have been delivered to Major Hagner, at New York, a short time since, and every one of which was, after a severe and minute inspection and trial, found, in every respect, to be perfect, by that officer of ordnance. Under these circumstances, I beg the liberty to renew my application for an order of from five to ten thousand pieces, together with the necessary cartridges. Price of carbines,

$20 a piece; price of cartridges, $22 per thousand. We are prepared—we, that is to say, the Amoskeag Company—*to manufacture for delivery one thousand pieces per month*, and I beg to repeat a statement made in my former letter, that my carbines are superior to any so far introduced, a fact which has been officially acknowledged, and known at home and abroad.

"Awaiting your kind reply, General, to the foregoing, I have the honor to be, with kind regard, your obedient servant,

EDWARD LINDNER,
"426 *Eleventh street.*

"General RIPLEY,
"*Ordnance Department, &c.*"

"ORDINANCE OFFICE, WAR DEPARTMENT,
"WASHINGTON, D. C., *April* 13, 1863.

"SIR: Your letter of the 25th of February, 1863, applying for an order for an additional number of your carbines, at twenty dollars each, and offering to furnish cartridges for the same at twenty-two dollars per M, was submitted to the War Department.

"By authority of that Department I now give you an order for all the carbines that you can make in six months from this date, not to exceed six thousand, to be of the same kind as the five hundred (500) carbines you delivered to Major Hagner, and to be inspected and approved by him. For each carbine, so delivered and accepted, you will be paid twenty dollars ($20.) Two hundred cartridges will be required for each carbine received from you, to be paid for at twenty-two dollars ($22) per thousand.

"Please signify your acceptance or non-acceptance of this order.

"Respectfully, your obedient servant,
(Signed) "JAMES W. RIPLEY,
"*Brigadier General, Chief of Ordnance.*

"Mr. E. LINDNER,
"426 *Eleventh street, Washington, D. C.*

"WASHINGTON, *April* 17, 1863.

"GENERAL: I have honor to acknowledge the receipt of your communication dated the 13th instant, tendering me an order for all the carbines (Lindner carbines) which I can make in six months from the date of your letter, not to exceed six thousand, and to be the same as the five hundred

delivered to Major Hagner, &c. The department further desires two hundred cartridges for each carbine, at twenty-two dollars per thousand. This order I have the honor to accept, under the condition above stated, and beg leave to express my thanks for the same.

"Trusting the department will increase this order, I have the honor, General, to be, with high regard, your obedient servant,

(Signed) "EDWARD LINDNER,
"426 *Eleventh street.*

"Brigadier General JAMES W. RIPLEY,
"*Chief of Ordnance.*"

"ORDNANCE OFFICE, WAR DEPARTMENT,
"WASHINGTON, *April* 17, 1863.

"SIR: Mr. E. Lindner having accepted an offer from this department to furnish Lindner carbines, a copy of the order is herewith inclosed for your information and guidance.

"Respectfully, your obedient servant,
JAMES W. RIPLEY,
"*Brigadier General, Chief of Ordnance.*

"Major C. V. HAGNER,
"77 *East Fourteenth street, New York.*"

The appellant had already furnished five hundred of these carbines, and had therefore the necessary model, machinery, tools, and patterns for pushing forward the work at once, and could, with its facilities for the business, have completed the full number of six thousand within the time limited. (See Record, p. 11.)

As soon as the contract was closed, the appellant commenced the manufacture of the six thousand pieces. Soon afterwards the Chief of Ordnance proposed certain changes, as appears by the following letter, (p. 10:)

"ORDNANCE OFFICE, WAR DEPARTMENT,
"WASHINGTON, *April* 23, 1863.

"SIR: The following extract is taken from a letter of Major Hagner, the inspector of contract arms, viz:

"'I think Lindner's carbines, under the new order, should have the hind-sight made for three elevations, and

be placed in front of the receiver. It is now too close to the eye. The lock-plate should be slightly changed in front of the cone-seat, so as to have the metal protect the wood. It is liable to be easily split at present.'

"Please report whether these changes can be made without additional cost to the arm. If so, let the change be made at once.

"Respectfully, your obedient servant,

(Signed) "JAMES W. RIPLEY,

"*Brigadier General, Chief of Ordnance.*

"Mr. E. LINDNER,

"*Care of Amoskeag Company, Manchester, N. H.*"

Which modification of the contract the company accepted. (p. 11.)

These changes could not be made alone, but necessitated various other changes, to make the different parts conform. (p. 11.) In consequence of these changes a new model became necessary. This model must be made by hand, and is a slow work, consuming considerable time. While making the alterations directly requested by General Ripley and the others necessarily required by reason of them, the appellant introduced some additional improvements, which were approved by the Ordnance Bureau, although not expressly requested. (p. 11.) These materially increased the value and efficiency of the arm. (pp. 7, 11.) In consequence of these changes none of the guns were, or could be, completed within six months from the date of the order. The appellant proceeded with the work from the time the changes were requested, and "made all of these alterations, which materially added to the value of the arms, without additional charge, in good faith, diligently, and without any delay other than that caused by the action of the Government. The time consumed by the company in filling the contract, beyond the time fixed and limited by the terms of the contract, to wit, six months, up to the time the six thousand carbines were ready in their several parts and were offered to the War Department for inspection, was rendered necessary and indispensable by the changes, alterations, and delays, caused solely by and

for the interest of the Government. They were so offered April 5, 1864." (p. 11.)

The Government refused to inspect or to receive the arms. (p. 11.) Being war material, they were of little or no value to the manufacturers as articles of general merchandise: the court therefore fixed this value at three dollars each. (p. 12.)

The appellant applied for relief in the first instance to the War Department. The Secretary of War was unwilling to decide the case. He made a statement of the facts and transmitted it to the Court of Claims for its adjudication under the terms of the 7th section of the act of Congress approved June 25, 1868, entitled "An act to provide for appeals from the Court of Claims, and for other purposes." (Stats. at Large, vol. XV, p. 76.)

The substance of the letter of transmissal is as follows:

"WAR DEPARTMENT,
"WASHINGTON CITY, *January* 31, 1870.

"*To the Honorable Judges*
"*of the Court of Claims of the United States.*

"The undersigned, Secretary for the Department of War, hereby represents that a claim against his department has been preferred in behalf of the Amoskeag Arms Company, which claim he desires to refer for decision to your honorable court. The said claim, although involving, as now presented, no disputed facts, does yet involve a controverted question of law, and is for a larger amount than three thousand dollars, and is therefore subject to be so referred under the 7th section of the act of June 25, 1868, in reference to the jurisdiction of the Court of Claims."

The statement of facts and accompanying documents transmitted by the Secretary of War will be found on pages 6, 7, 8, 9, and 10 of the record.

The appellant thereupon filed his petition in the Court of Claims, setting forth his cause of action in appropriate terms, and showing that the Secretary of War had referred the matter in the manner before stated. (pp. 1, 2, 3.)

Issue having been joined, considerable testimony was

taken by both parties. The claimant on his part established certain ultimate facts, which are set forth on pp. 10, 11, and 12 of the record.

It is believed that these ultimate facts cover all that is contained in the statement of the Secretary of War, and in no respect contradict them, although some few additional facts are adduced by way of explanation and amplification.

The judges of the Court of Claims being equally divided as to the admissibility and legal effect of the agreed facts, and being also equally divided as to the admissibility and effect of the testimony other than the agreed facts in an action so transferred by the head of an Executive Department under the act 25th June, 1868, (15 Stats. at Large, p. 75, § 7,) and certified by him to involve only a controverted question of law, the court, for the purposes of an appeal, decided, as a conclusion of law, that upon the facts found judgment should be for the defendants, and the petition should be dismissed.

Whereupon the appellant appealed to this court.

Four question are here raised for the consideration of this court, although a solution of them all may not be deemed necessary for the adjudication of the rights of the appellant.

1st. Did the transmissal of the statement of facts by the Secretary of War, under the 7th section of the act of June 25th, 1868, with a declaration that the case involved no disputed question of facts, but only a question of law, place the facts thus stated in evidence before the court?

2d. If the facts so presented by the Secretary of War were in evidence before the court, did they show a right of recovery on the part of the claiment below?

3d. Could the claimant adduce additional evidence in support of his action, provided such evidence did not contradict or conflict with the facts presented by the Secretary?

4th. If such additional evidence could be received; upon the whole case shown, is the appellant entitled to recover?

ASSIGNMENT OF ERRORS.

1st. The court erred in not deciding that the statement of facts transmitted by the Secretary of War was evidence of the facts therein stated.

2d. The court erred in not deciding that these facts entitled the claimant to judgment.

3d. The court erred in not deciding that additional evidence could be adduced by the claimant.

4th. The court erred in not deciding that the facts established by the testimony entitled the claimant to judgment.

5th. The court erred in adjudging that the petition be dismissed.

ARGUMENT.

I

Did the transmissal of the statement of facts by the Secretary of War, under the 7th section of the act of June 25, 1868, with a declaration that the case involved no disputed question of facts, but only a question of law, place the facts thus stated in evidence before the court?

The section of the statute reads as follows:

"SEC. 7. *And be it further enacted*, That it shall and may be lawful for the head of any executive department, whenever any claim is made upon said department involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant, and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct

any account, matter, or claim of the character, amount, or class described or limited in this section to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said Court of Claims, for trial and adjudication: *Provided, however*, That no case shall be referred by any head of a department unless it belongs to one of the several classes of cases to which, by reason of the subject-matter and character, the said Court of Claims might, under existing laws, take jurisdiction on such voluntary action of the claimant. And all the cases mentioned in this section which shall be transmitted by the head of any executive department, or upon the certificate of any Auditor or Comptroller, shall be proceeded in as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations; and appeals from the final judgments or decrees of said court therein to the Supreme Court of the United States shall be allowed in the manner now provided by law. The amount of the final judgments or decrees in such cases so transmitted to said court, where rendered in favor of the claimants, shall in all cases be paid out of any specific appropriation applicable to the same, if any such there be; and where no such appropriation exists, the same shall be paid in the same manner as other judgments of said court."

The act clearly contemplates two classes of cases—first, those involving disputed facts; second, those involving controverted questions of law. No commentary on this can be any plainer than the language used; but even if it were doubtful, the proposition can be dismissed as not essential to the determination of this case.

If the statement placed these facts in evidence, the appellant and claimant was entitled to the full benefit of them. If they were not in evidence, every fact therein contained was proved by the testimony, and is set forth independently in the findings of the court. (See Record, pp. 10, 11, 12, 13.)

II.

If the facts so presented by the Secretary of War were in evidence before the court, did they show a right of recovery on the part of the claimant below?

These facts are as follows: the exhibits showing the contract having been already set forth are not repeated:

"1. On the 26th of February, 1863, Edward Lindner, patentee of the Lindner carbine, made a written application to General Ripley, then Chief of Ordnance in the War Department, for an order to furnish a quantity of his carbines, as shown per his letter appended hereto, marked A.

"2. On the 13th of April following, General Ripley, by authority of the War Department, gave said Lindner an order for all the carbines he could make in six months, not exceeding six thousand, as per letter dated April 13, 1863, appended hereto, marked B.

"3. On the 17th of the same month said Lindner addressed a letter to General Ripley accepting said order, as per his letter dated April 17, 1863, marked C.

"These papers, A, B, and C, constitute the original grounds upon which this claim is founded.

"It was understood that the Amoskeag Company were to fabricate the arms at their works at Manchester, New Hampshire, said company having made the five hundred carbines previously furnished, to which reference is made in the above-named papers, marked A and B.

"4. Major Hagner, an officer of the Ordnance Department, whose special duty it was to oversee the manufacture of contract arms, and to inspect them, was immediately informed by General Ripley of the order to Mr. Lindner, as per letter hereto appended, marked D.

"On the receipt of the foregoing order, the Amoskeag Company commenced preparations to fabricate the arms and purchase certain tools and fixtures especially adapted to the fabrication of the carbines as ordered, with the changes immediately hereafter referred to, the company having on hand a portion of the machinery for their fabrication.

"5. On the 23d of April, 1863, General Ripley, Chief of Ordnance, addressed a letter to Mr. Lindner, requesting certain changes to be made in the construction of said carbines, as per letter hereto appended, marked E.

"6. When about the six months limited in the order for the completion of the contract expired, (viz, in November, 1863,) the carbines were not finished and ready for inspection, but parts were in progress, and some of them were approaching completion.

"No notice was then or ever given to the contractors not to proceed with the work, or that objection would be made

that the arms were not furnished in the six months limited in the order. Major Hagner, inspector of contract arms, was occasionally at the company's works, and knew of the progress of the work.

"7. On or about the 5th of April, 1864, Hon. E. A. Straw, agent of said Amoskeag Company, called on the Chief of Ordnance, at the War Department, and exhibited a finished carbine as a specimen of the six thousand carbines the Amoskeag Company had in progress of fabrication under the aforesaid order, and represented that all the six thousand carbines were then so far advanced as to be ready for delivery to the inspectors as fast as they could receive and inspect them, and asked that they be then inspected and received by the department, which was not then and has not since been done.

"8. Inspection of contract arms is always at the place of manufacture, and is made of the parts of arms before they are assembled, and again of the complete arm after the parts are put together.

"9. Arms are said to be ready for inspection, and it is the common practice for contractors to call for inspectors and for the department to furnish them, when the parts of the arms are so far advanced that they can be finished and furnished to the inspectors as fast as they can receive and inspect them in the ordinary course of inspection. Such is the usual course of eroceeding in cases of contract arms.

"10. The changes in the construction of the arms required by the Chief of Ordnance were made by the contractors, and these changes necessitated other changes to make the parts conform, and alterations in the machinery, and new tools and fixtures to perform the work.

"Other changes were made in the construction of the arm by the contractors, on their own motion, which were important and judicious, and materially improved the arm.

"Precisely how much time these changes required is not agreed, but it is admitted by the department that they necessarily required at least two or three months, a part of which resulted from the action of the department, and that the contractors proceeded in good faith and without unnecessary delay.

"11. Before the expiration of six months from the date of the order to Lindner, it was reported to the contractors from the Ordnance Bureau that it was rumored that the five hundred carbines previously furnished had proved unsatisfactory in service, and contractors made what effort

they could to ascertain in what particulars, if any, said carbines were defective, in order to remedy the evil in those then in process of construction. The rumor proved unfounded, but the work was hindered and delayed thereby.

"12. From July, 1863, to April, 1865, the Government constantly had inspectors at the company's works at Manchester, under the direction of Major Hagner, inspecting muskets made by said company for the Government. The precise time when said six thousand carbines were finished and assembled, is not agreed, but it is admitted and agreed that said carbines were so finished in May, 1865, and that said Amoskeag Company then had said carbines at the place of their manufacture, in Manchester, New Hampshire.

"13. In many cases of contract arms there have been renewals and extensions of time."

To avoid a needless repetition of authorities and arguments, we will refer the court to what is to be said under the fourth head of our argument.

III.

Could the appellant and claimant adduce additional evidence in support of his action, provided such evidence did not contradict or conflict with the facts presented by the Secretary?

An examination of the 7th section of the act of June 25, 1868, hereinbefore set forth, must satisfy the court that it was not intended to confer upon a claimant any right he did not before possess, or to take from him any right. Without regard to this statute, he could bring his case before the Court of Claims at any time. In the case of Clyde *v.* The United States, 13 Wallace, p. 38, this court decided that a claimant could sue in the Court of Claims directly, without waiting for a decision from an executive department; and that a rule of the Court of Claims requiring such a decision as a condition to bringing suit was void.

The object of the statute was unquestionably twofold: 1st. To relieve the executive departments of the labor and responsibility of deciding important doubtful cases, when,

if their decision should be in favor of the claimant, he would take his money and depart; but if against him, he would immediately resort to the court for a re-investigation of the matter. 2d. In questions of fact, to enable the Government to have the opportunity to cross-examine witnesses, and to substitute a judicial for an *ex parte* investigation; and in questions of law to procure the interpretation of that department of the Government which is believed under our system is most eminently qualified to deal with such questions.

This last proposition is illustrated by the fact that the cases which an executive department can refer are precisely those cases which are appealable from the Court of Claims to the Supreme Court. (See the section just cited, and section 5 of the act reorganizing the Court of Claims, Vol. XII, Stat. at Large, p. 765.)

By the reference of the head of a department, the claimant therefore acquires no new right. Unless the case is one of which the court already could take jurisdiction, by the express terms of the act, it cannot be so referred. The reference merely dismisses the case from the department, and leaves the claimant to pursue it in the court, where he is at liberty to prove it up; or if he fails in his proof, an adverse judgment, not appealed from, is by statute made a final and complete bar, and ends the controversy. (See Stat. at Large, Vol. XII, p. 765, sec. 7.)

There is nothing in the statute to authorize the belief that the claimant has not the same rights and opportunities when referred to the court as if he had commenced there voluntarily. The very words of the act are that the case "shall be there proceeded in as if originally commenced by the voluntary action of the claimant." The theory that claimant could not strengthen his case by additional evidence could only arise from regarding the statement of facts as an estoppel upon him. Even if this were so, the most that could be urged would be that he must not deny anything contained in it; and this he does not attempt.

There is no element of estoppel in the matter. The

agreed statement was one of the necessary preliminaries to enable the Secretary of War to procure the opinion of the Attorney General. That officer will not decide questions of fact; and the head of a department, in referring a case to him, must, by agreement or otherwise, present the facts as settled.

The Secretary of War having thus satisfied himself of the facts, and still doubtful as to the rights of the claimant, transmitted the case as one involving only a legal question.

We submit that these facts stand only as admissions made by the claimant, which he does not seek to avoid. As such they were, beyond doubt, rightly used as evidence by the defendant. But it would be an offense to argue that such admissions exclude all other testimony.

It would have been impossible for the Court of Claims to try this case upon the facts presented by the Secretary. No measure of damages was there given. The Secretary, if satisfied of the justice of the claim, could accept the guns and pay the contract price; but when the case was transferred to the court no such relief could be given. The Court of Claims has no chancery powers to decree the specific performance of a contract, but can only award pecuniary damages; and for this purpose additional evidence must have been taken.

IV.

If the additional evidence shall be received; upon the whole case shown, is the appellant entitled to recover?

The ultimate facts found by the court as having been established by the testimony, and which are deemed material, are as follows:

"1. The Amoskeag Manufacturing Company is a corporation, duly established by law, and having its place of business at Manchester, New Hampshire.

"In 1862 the company manufactured 500 Lindner carbines for the defendants, and delivered the same. Subsequently, and on the 13th April, 1863, another contract was entered into, embraced in the correspondence and order set forth in the petition. Upon the receipt of the order of

the Ordnance Department, and immediately after the 13th April, 1863, the company prepared to make the 6,000 carbines named in the contract. After they had been put in process of manufacture, the Ordnance Department, on the 23d April, 1863, requested and directed, by written communication, changes and alterations to be made in the arms, if it could be done without additional cost. The company undertook to make the changes and alterations desired, when it was found that other alterations were necessary to conform to those requested, and still others were necessary to perfect the arm, including that of interchangeableness of parts. As soon as possible a new model was made, combining all the changes, alterations, and improvements, and that model was approved by Major Hagner, then superintendent for the Government of contract arms, who was often at said company's works. (A model has to be made by hand, and is a slow work, as each piece has to be filed and fitted separately, and afterwards becomes the pattern by which steel dies and gauges, cutting, milling, and other tools are to be made, so as to make all the different parts similar and interchangeable.) The company made all of these alterations, which materially added to the value of the arms, without additional charge, in good faith, diligently, and without any delay other than that caused by the action of the Government. The time consumed by the company in filling the contract beyond the time fixed and limited by the terms of the contract, to wit, six months, up to the time the six thousand carbines were ready in their several parts, and were offered to the War Department for inspection, was rendered necessary and indispensable by the changes, alterations, and delays caused solely by, and for the interest of, the Government. They were so offered April 5th, 1864. As the Government neglected to inspect the parts, they were kept several months waiting for that purpose. They were finally inspected by a competent person provided by the company, were assembled or put together, and packed in cases of Government pattern complete. The company had means and facilities, and could have delivered the six thousand carbines of the kind contracted for within the six months limited, in conformity with the contract as first maee, had not the changes and alterations been desired and requested. The company was manufacturing other arms for the Government at the time of the contract, and continued to do so until the war closed.

"In all other work on guns made, the Government kept a corps of inspectors inspecting the work as fast as it progressed, but in this case they neglected to do so. They had inspectors at Manchester at the precise time these carbines were ready for inspection, but they did not inspect them.

* * * * * *

"15. That the claimant had the facilities to make, and could have manufactured, six thousand carbines of the pattern originally ordered within six months from the date of the order."

* * * * * *

Upon these facts we think two principal questions arise:

1st. What number of arms did the claimant agree to furnish and the defendant agree to receive?

2d. Under all the facts in the case, was the time first agreed upon extended, and the condition as to performance within the time waived?

In his communication of February 25, 1863, Mr. Lindner says: "We are prepared—we, that is to say, the Amoskeag Company—to manufacture for delivery one thousand pieces per month."

General Ripley replies to this: "I now give you an order for all the carbines that you can make in six months from this date, not to exceed six thousand."

If nothing more had occurred, the extent of the order would have depended upon the number the company could finish within that time; and no other test would have been admissible than the number actually manufactured. The actual results alone could have determined that.

Changes, however, were introduced by the defendant which precluded the claimant from completing any of the arms within the time limited.

Therefore some other test must be applied. The number of guns which the appellant could have made in six months must be determined, not by actual results, now become impossible, but by an examination into the business facilities of the company. This has been done, and the court finds that "the claimant had the facilities to make, and could have manufactured, six thousand carbines of the pattern

originally ordered within six months from the date of the order." (p. 12.)

An implied agreement to enlarge the time must have the same operation as would an express agreement to that effect. Let it be supposed that when the alterations had been assented to it had been expressly stated that a reasonable increase of time should be allowed, and at the end of twelve months the claimant should present itself with the six thousand arms and satisfactory proof that the additional time consumed was only reasonable and fair: would the defendant be permitted to say, "I admit the agreement as you state it." "I admit the changes made and the enlargement of the time, as you state it." "I admit that the additional time employed was only reasonable: but these changes have left no way of determining the number of guns I am to receive." A court would have no hesitation in solving this difficulty by saying that where the number was in itself indefinite, and one method of fixing it had become impracticable by the act and suggestion of the defendant, he could not thereby avoid his contract, but the number must be determined by some other fair and equitable construction of the contract when viewed in the light of all the surrounding circumstances.

2d. We submit that in this case the time was enlarged by the act and consent of the Government, and that the condition as to the performance within six months was waived.

It is a peculiarity of gun manufacture that the principal time and labor is required in the preparation of the models, the tools, and the machinery. All of these being given, there is scarcely any limit to the rapidity with which small arms can be turned out. And until these are prepared the process is painfully slow and laborious.

Considering these facts, it is a mistake to call the alterations introduced into this gun slight.

They were of such a character as to require double the time which would have been required under the original contract, and they were introduced at the instance and request of the defendant.

The effect of the changes was to absolutely prevent the fulfillment of the contract if the original time remained the essence of the contract as thus altered. The Secretary of War says, in his statement, which was prepared under the guidance of the Ordnance Bureau: "Precisely how much time these changes required is not agreed, but it is admitted by the department that they necessarily required at least two or three months." And the court finds that the increased time was reasonable and necessary.

The claimant was dealing with experts, who were well acquainted with the processes used, and are presumed to have known the consequences which would result from their suggestions.

An effort has been made to charge the appellant with having contributed to the delay, because it took the pains to introduce some improvements which General Ripley had not requested. This criticism is both ungenerous and unjust.

When it became necessary to remodel the gun, as requested, it was no longer possible to adhere to the limitation of time first proposed. An enlargement of time being absolutely required, there could be no objection to any further changes which the Government should approve of. It having become necessary to make a new model, no more time would be required to introduce the additional changes.

The time for the performance of a written contract may be enlarged and the strict performance as to time waived by implication.

Flemming *v.* Gilbert, 3 Johns., 531.
Keating *v.* Price, 1 Johns. Cas., 22.
Emerson *v.* Slater, 22 How. S. C. R., 28.

Plaintiff agreed to build defendant a house, to be finished by December 25: the plastering was not included. Defendant made a contract with a third person for this work, of which the plaintiff had knowledge and assented to. The plasterer was much behind with his work, and thereby the plaintiff was delayed. The defendant insisted that as the

plaintiff had full knowledge of the contract and assented to it, and did not stipulate for any increased time on account thereof, he could not make it an excuse for his own default in time.

Held, that the defendant was answerable for this delay, and could not throw it on the plaintiff, because the plaintiff had assented to the contract.

Van Buren *v.* Digges, 11 How. S. C. R., 461.

Where the employer, by directing a change in the mode of working, prevents performance by the day stipulated, the other party being ready and willing to perform, it is equivalent to performance.

Farnham *v.* Ross, 2 Hall, 167.
Sloo *v.* Law, 1 Blatch., 512.

Where work is done under a contract, the specifications of which are departed from by direction of the defendant, such a departure excuses performance within the time limited by the contract, and the obligation thereafter is to complete the work within a reasonable time.

Green *v.* Gaines, 1 Hilt., 254.
Van Buskirk *v.* Stow, 42 Barb., 9.

"If a party to a contract, who is entitled to the benefit of a condition, upon the perfomance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition."

Williams *v.* The Bank of the United States, 2 Peters, 101.
Comyn's Dig., title Condition, (L. 6.)
Coke Littleton, 206*a*.
Bacon's Abridgement, title Condition Q.
Viner's Abridgement, title Condition G.
Chitty on Contracts, 811.
Shaw *v.* Hurd, 3 Bibb, 372.
Marshall *v.* Craig, 1 Bibb, 379.
Borden *v.* Borden, 5 Mass., 69.

Whitney *v.* Spencer, 4 Cowen, 39.
Alston *v.* Herring, 11 Exch., 830.
Benjamin on Sales, 422, 423.
Smith *v.* Lewis, 24 Conn., 624.
Same *v.* Same, 26 Conn., 110.
Hotham *v.* East India Bank, 1 Term R., 638.

Domat says:

"If the event or fulfillment of a condition be hindered by the party whose interest it is, that it do not happen, whether it depend on his act or not, the condition with respect to him shall be held fulfilled, and he shall be obliged to do what he was bound to do, give, or suffer in case the condition happened."

Domat, secs. 193, 196, 220.
1 Evans' Pothier, 207, 208.

It is a sound principle, that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned.

Mustin *v.* Gladstone, 6 Queen's Bh., 693.

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Of Counsel.

In the Supreme Court of the United States.

AMOSKEAG MANUFACTURING COMPANY
vs.
THE UNITED STATES.
No. 95.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the plaintiff from a judgment of the Court of Claims dismissing a petition filed in order to recover the price of certain carbines said to have been manufactured for the United States in 1863–'64.

The contract of the United States, under the authority of the War Department, was (Rec., p. 9) *to purchase all the carbines, not to exceed six thousand, that the plaintiff could make in six months from April* 13, 1863.

The plaintiff made none within that time; but did make and tender six thousand by the fifth day of April, 1864. (Rec., p. 11.)

It was shown that this delay was occasioned by certain changes in the form of the carbines made by the plaintiff, some at the instance of the Ordnance Department, others of its own head. (Rec., p. 11.)

The United States declined to receive the arms, which remained on the hands of the plaintiff. (Rec., p. 12.)

The claim had originally been preferred before the Secretary of War, and was by him transmitted to the Court of Claims, January 31, 1870. In so referring the claim, the Secretary accompanied it with a statement of facts agreed upon between the parties before him, and remarked that the matter in controversy was a question of law. (Rec., p. 6.)

The facts so agreed upon are contained in the record, in articles numbering from 1 to 15, beginning on page 6.

After these reached the Court of Claims, the plaintiff filed a petition as if the suit had originated there, (Rec., p. 1,) and the attorney of the United States answered, denying the allegations, &c. (Rec., p. 4.)

The claimant introduced other evidence bearing upon its claim, and the court (Rec., p. 10) found certain facts as established thereby.

It does not appear that the United States objected to the reception of this additional evidence.

In the Court of Claims both parties asked the court to find as facts the contents of the fifteen articles transmitted from the Department of War. (Rec., pp. 12, 13.)

The findings of the Court of Claims are *two*, numbered in the record in Roman numerals, the former of which (p. 6) includes as subdivisions the *fifteen* articles above mentioned; the latter, (p. 10,) *five* other articles based upon *new* evidence introduced by the plaintiff.

The former finding is as follows: (Rec., p. 6.)

"I. The claim on which this action is brought being before the Secretary of War, and no disputed facts existing, but there being a controverted question of law, an agreed statement of facts was made, and the Secretary of War thereupon, on the 31st of January, 1870, transmitted the claim, with the agreed statement of facts, to the Court of Claims, which submission and statement are in the words following:" [Then follows the letter from the Secretary of War transmitting the claim.]

The latter finding is—(Rec., p. 10:)

"II. Upon the trial of the case, the claimant, besides the foregoing agreed facts, put in evidence certain testimony establishing the following ultimate facts:" [Stating the five additional articles alluded to above.]

The statement of facts concludes as follows: (Rec., p. 12:)

"And the judges of the Court of Claims, being equally divided as to the admissibility and legal effect of the agreed facts, and being also equally divided as to the admissibility and effect of the testimony, other than the agreed facts, in an action so transferred by the head of an Executive Department, under the act of June 25, 1868, (15 U. S. Stats., 75, sec. 1,) and certified by him to involve only a controverted question of law, the court, for the purposes of an appeal, decides, as a conclusion of law—

"That, upon the facts found, judgment should be for the defendants, and the petition should be dismissed. By the court."

ARGUMENT.

Referring to the order in the assignment of errors in the brief of the plaintiff, (Rec., p. 7,) we submit:

1 and 3. That the court *did decide*, that the statement of facts transmitted by the Secretary of War

was evidence of the facts therein stated, *and* that additional evidence could be adduced by the claimant.

It sufficiently appears, notwithstanding the equal division of the court, referred to on page 12 of the record, that the facts set forth in both of what we have designated as the findings of the court, *were found:* In view of what, upon the face of the record, the court has *done*, the state of mind of its members in the doing, as mentioned on page 12, is an abstraction, and not the subject of review or remark here.

We agree with the plaintiff that, in so finding the facts presented by the Secretary of War, and also in allowing their evidence to be introduced, the Court of Claims committed no error.

We understand the act of 1868, quoted in the plaintiff's brief, to place the question at issue between the claimant and the United States, upon its being transmitted from a Department into the Court of Claims, entirely *at large*. Before the latter tribunal the plaintiff is to proceed just as if the case had been "originally commenced" there. By the expression "any claim involving disputed facts or controverted questions of law," the statute merely intended to employ a very general expression covering all classes of claims, and is not to be taken as giving a direction that the Department is to sift out the special question and present it alone for decision. *Here* the Secretary of War could not find the facts for the court, nor would the parties be estopped by admissions made before him for purposes of the litigation there. Congress meant that, upon the reference of the claim, the court

should use, untrammelled, its own methods and its own discretion in determining facts and conclusions of law, as well as in giving judgment.

Both parties in the Court of Claims agreed that the evidence under the first finding, no matter whence introduced, established all the facts which previously had been *admitted* before the Secretary of War. Both asked the court to find those facts. Therefore, the question whether the Secretary could find facts, and limit the court to the duty of drawing conclusions of law therefrom, does not arise.

As to the *additional* evidence, and the finding, and conclusion of law, no objection was taken on behalf of the United States in the Court of Claims, or is here, to any part thereof. We think that the court had power to admit such evidence, and we agree to the finding and conclusion actually made thereupon.

2, 4, and 5. We will argue the 2d, 4th, and 5th assignments of error together, as being substantially one, upon our theory of the state of the record.

We take issue with the plaintiff as to each.

The facts are, that, upon a representation made by the plaintiff's agent to the Chief of Ordnance in February, 1863, that the plaintiff desired an order for several thousand carbines, and was prepared to manufacture for delivery *one thousand per month*,—the Chief of Ordnance on the 13th of April, 1863, gave them an order "*for all the carbines that you can make in six months from this date*, not to exceed six thousand," &c. This was accepted at once. On the 23d of the same month, the Chief of Ordnance suggested a change of location

in the hind-sight of the weapon, and a slight change in the lock-plate. These suggestions were assented to. They necessitated other alterations; and "still others were necessary to perfect the arm," and were made. Taken altogether, these changes rendered necessary the delay, to wit, to April 5, 1864, for the completion of the six thousand carbines. The United States refused to receive them.

The proposal of the plaintiff looked to the delivery of the carbines by monthly instalments. The offer of the Department based thereupon was to take, not a definite number, but all that could be furnished within six months, whether fifty, or five hundred, or fifteen hundred, or five thousand,—so that they did not exceed six thousand.

Both parties contemplated the probable delivery of six thousand, but what the United States engaged for was, the results of the industry of the plaintiff on such carbines, limited to six months, be the results small or large, so that they did not exceed six thousand.

The slight changes suggested by the United States would not, apparently, either by their direct or indirect effect, have diminished the percentage of those results to any considerable extent. The plaintiff chooses to leave the court ignorant of that extent, and it is a matter of just observation that, both before the Secretary of War and again before the court, it *mingled* the effect upon the *time* of delivery, of the changes required directly or indirectly by the Government, with that of those other *improvements* added of its own head. This is a sort of *voluntary confusion* of effects that probably will be of no service to the cause of the claimant.

There is another change in the character of the performance of this contract which is observable. The plaintiff proposed to furnish by instalments one thousand every month—that is, about enough at each delivery for a regiment. It changed this, and furnished none for six months. This was a clear disappointment to the Government. It was a change somewhat ingenious, as a foundation for this claim. It seems to us that if the changes desired by the United States, directly or indirectly, had been the only ones undertaken, and, upon the plaintiff's abiding by the original form of its engagement, it had appeared that within the six months it could furnish, say only four thousand, the purely voluntary and unauthorized character of its proceeding after that time to manufacture two thousand in addition, would have been plain, perhaps plainer than the appearance of its want of authority as the case now stands. We submit, however, that, upon consideration, it is not less certain that the plaintiff cannot recover for the results of its industry after the expiration of the six months under the real, than it would have been under the supposed, state of facts. The only result will be that, as it made no perfect carbines within six months, it can recover nothing.

We need not say how very important *time* is in all matters concerning a flagrant war, or how especially important during the year 1863 of the late war. The variation of a performance under which the Government in 1863 might reasonably have expected several thousand arms from time to time within six months, to one in which it was to receive none for a year, was a

variation of first-rate magnitude. We have no occasion to dispute the general principles of law established in the cases cited on behalf of the claimant. This is not a case of a contract for a *certain* number of arms to be furnished within a *certain* time, which is the general character of the cases cited. If it had been, and there had been besides no confusion of improvements volunteered by the manufacturer with those required by the Government, the court might have adopted the substitution of *reasonable* time for the specific time limited in the contract. But here, if the expression *reasonable* be substituted, the result becomes uncertain, the question for the court under such circumstances being, what is a reasonable time for the completion of any number of guns not to exceed six thousand? The company was not originally bound to furnish the whole amount. It might have furnished, say only a thousand. That which would be reasonable time for the manufacture of a thousand, is not so for five thousand. Could the company have tendered the Government one thousand in April, 1864, and by proving that by altering the model it required twelve months to make them, have recovered the value of that number?

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